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Briefing Paper:

Collective Bargaining "Reform": What Does Business Want? And What Would Actually Fix the System?*

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Summary

- The dramatic erosion decline in private sector collective bargaining visible in recent years has been maintained. The share of private sector workers covered by enterprise agreements (EAs) has now been halved since 2013, to only 11%. This decline reflects three simultaneous negative trends: declining agreement renewals, fewer new agreements being negotiated, and high rates of agreement termination.
- The consequences of the disappearance of collective bargaining are profound for workers, employers and the overall economy. It is clear that the rapid decline in EA coverage in the private sector has been a significant factor in the unprecedented deceleration of wages in Australia. Fewer workers on EAs means lower wages growth.
- Despite clear evidence that the enterprise bargaining system is depriving the majority of workers of effective representation and bargaining rights, powerful business lobbyists and the federal government are now pursuing an aggressive post-election workplace relations agenda to diminish the already-weak collective bargaining system even further. Changes to industrial relations rules proposed by business broadly signal a return to the Work Choices pattern of unilateral employer wage-setting power in enterprise agreements.

** This version of the paper corrects an error arising from a data coding problem which resulted in an inaccurate allocation of newly approved enterprise agreements between new and renewal agreements.*

- The changes to enterprise bargaining proposed by business lobbyists include: weakening or removing the Better Off Overall Test; weakening scrutiny of non-union EAs; diminishing the scope of matters employees may negotiate with their employers; and blocking bargaining altogether through introduction of "whole of life" greenfields agreements. Together these changes would further restrict union representation, reduce the effectiveness of the already weakened collective bargaining compliance regime, and expand the incidence of low-wage non-union EAs.
- Based on the experience of EAs under the Work Choices era (2006 through 2009), when similar measures were in place, we can expect a resurgence of non-union EAs if those proposals are accepted. This would come at the expense of both genuine collective bargaining and Award coverage, and would produce a decline in average wage increases for EA-covered workers (since wage increases in non-union EAs are consistently lower than for EAs negotiated with union involvement). Simulations suggest that the loss of wages resulting from the resulting slowdown in (already-weak) wage growth could cost an average private sector EA-covered worker over $2000 in lost income over just the first three years – and would reduce wages by billions of dollars across the broader private sector workforce.
- If genuine industrial relations reform is not pursued to expand bargaining rights to the 89% of private sector workers without current EA coverage, then authentic collective bargaining will continue to disappear from Australia's private sector, diminishing workers' collective voice and bargaining power. This paper concludes by proposing ten more genuine reforms to strengthen and modernise collective bargaining, and give workers a better chance at winning future wage increases.

Contents

Introduction

Concerted campaigning by labour advocates during the recent 2019 federal election campaign put low wages growth and growing inequality under the public eye. The Coalition avoided workplace relations matters almost entirely in its election platform – concerned about the influence of the growing campaign to demand progressive changes in labour laws, and still smarting from the Work Choices backlash that culminated in their 2007 election defeat. Now, after the unexpected return of the Coalition government, the workplace relations system is again "open for business": with the new Industrial Relations (IR) Minister Christian Porter announcing a national review into workplace relations.

As the review gets underway, a re-energised agenda to reduce workplace rights is taking shape. Current proposals from principal business lobby groups — including the Business Council of Australia (BCA), the Australian Industry Group (AiG), the Australian Mines and Metals Association (AMMA), and the Australian Chamber of Commerce Industry (ACCI) — have advanced a long and growing list of demands, including:

- weakening employee protections against unfair dismissal and casual employment entitlements;
- further weakening collective bargaining rules and practices (including introducing long-lasting life-of-project agreements); and
- harsher laws to restrict and police union activity.

The government has indicated all of these proposals will be considered in their workplace relations review.[1] In particular, the idea of life-of-project greenfields agreements was addressed in its first "tranche" of IR consultation papers in September 2019;[2] the government even announced in October that it would indeed legislate that change (casting doubt on the extent to which the current "review" constitutes a genuine inquiry, rather than an exercise to prepare the ground for changes it has already decided on).[3]

Introduced in the 1990s as the primary form of collective bargaining, and revised through subsequent legislation and jurisprudence, enterprise bargaining is rapidly disappearing from Australia's private sector. Only 11% of Australians employed in private-sector workplaces are now covered by a current enterprise agreement (EA), half the coverage of just six years ago. This collapse in collective bargaining coverage has had significant negative consequences for labour incomes, including: historically

[1] See E. Hannan, 'Christian Porter's bid to reshape workplace landscape'. *The Australian,* 27 June 2019.
[2] Indicative of the government's belief that weaker collective bargaining is a precondition for investment and job creation, their life-of-project agreement consultation paper has been titled, "Attracting major infrastructure, resources and energy projects to increase employment." A second consultation paper exploring options for criminalising wage theft was also released. See Attorney-General's Department, *Industrial Relations Consultation.* Canberra. Available at https://www.ag.gov.au/Consultations/Pages/industrial-relations-consultation.aspx
[3] See P. Coorey, 'Big projects to get strike protection', *Australian Financial Review,* 21 October 2019.

weak wages growth, rising inequality, and rising household financial stress. It has also had wider economic consequences, including a 6-year low in consumption growth, lagging retail sales, and slowing GDP growth.

Employer lobby groups want to continue to restrict the collective bargaining system solely to the enterprise level. This highly decentralised system has largely benefited employers, through decreased employee bargaining power and hence lower labour costs. Moreover, with fewer workplaces negotiating EAs, employers who consider present commitments in EAs to pay above-Award rates and entitlements have been emboldened more recently to abandon enterprise agreement altogether. This is evidenced by the dramatic increase in employer-led agreement terminations since 2015, as well as by the increasing proportion of private sector workers whose pay and conditions are now set according to Award minimums (up from 16% of all workers in 2012, to 23% in 2018).[4] However, while some employers may scrap EAs altogether, many still prefer EAs: because setting identical terms across their workforce can be more efficient than administering and maintaining multiple individual contracts, and having a current EA removes the possibility of industrial action by workers agitating for improved terms.

EAs have become more aligned with employer strategies to unilaterally set pay and conditions; this is in large part due to the ease in which non-union EAs can be created and implemented, with no representation or negotiation from the workers' side. Yet ironically, business lobbyists still claim that the dramatic EA coverage decline experienced in recent years in fact reflects an "imbalance" in labour relations that favours employees and their unions; it is claimed that the current bargaining system extends too many rights to employees, has increased employer transaction costs, and has reduced the "flexibility" required to maintain business competitiveness. In this view, employers have responded by simply no longer choosing to negotiate agreements with their workforce. This self-interested view of industrial relations is influencing government policy-making, and is symptomatic of the very confused mandate for collective bargaining in Australia.

In light of this rapidly-emerging employer IR agenda, this briefing paper surveys the "state of play" for collective bargaining in Australia's private sector. The first section outlines the composition, dynamics and consequences of the recent decline in enterprise bargaining.[5] The second section documents the major changes proposed by business representatives to enterprise bargaining, and their likely impacts on levels of bargaining, EA coverage and employee representation. Finally, the third section considers how the *Fair Work Act 2009* (FW Act) might be genuinely reformed to build a truly viable and authentic collective bargaining system – halting the dramatic decline in

[4] Australian Bureau of Statistics (ABS), Employee Earnings and Hours, Cat No 6306.0, ABS: Canberra, May 2018.
[5] This report provides updated data on private sector enterprise bargaining decline; for a more detailed analysis, see also A. Pennington, *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector*, Centre for Future Work: Sydney, 2018.

coverage, and extending the effective ability to bargain collectively to a much greater share of the workforce.

This paper focuses on the private sector, which is where EA coverage decline has been most dramatic, and where employers have been most explicit and ambitious in their lobbying demands. However, we stress that these proposals, if implemented, will have many implications for public sector workers, too. They will suppress the influence of unions and collective bargaining even further, and enhance both economic and political pressure on governments to forcibly harmonise public sector bargaining outcomes downward to ever-weaker private sector outcomes. So workers and unions in both the private and public sectors of the economy should view the direction of the government's IR "reform" process with great concern.

The primary data source for this report is a census database of federally registered enterprise agreements approved since the introduction of enterprise bargaining in October 1991: the Workplace Agreements Database (WAD). The WAD is maintained by the Attorney-General's Department (AGD). Supplementary summary data from AGD's quarterly *Trends in Federal Enterprise Bargaining* is also utilised.[6] The research considers both the flow of new EA approvals, and stocks of EAs currently in effect at any given time.[7]

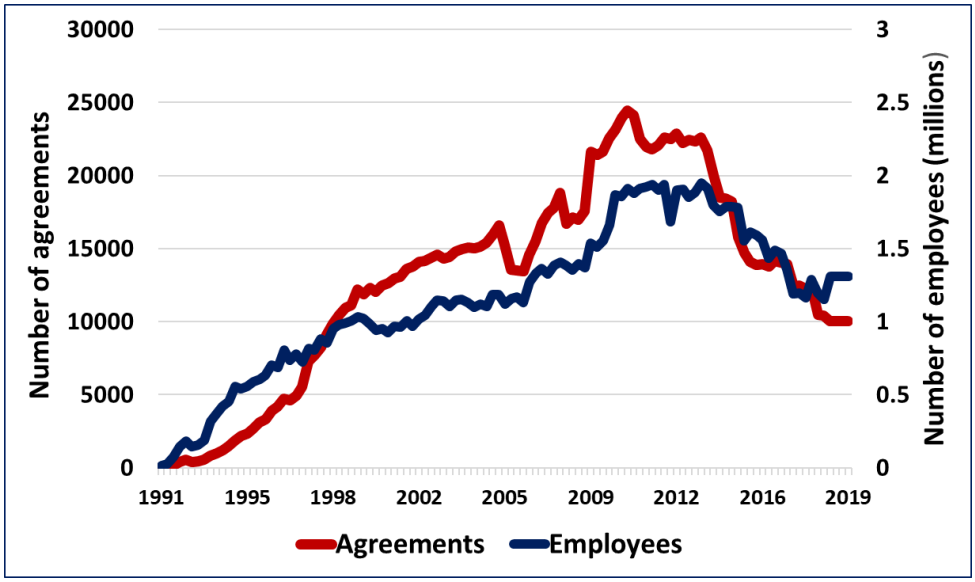
[6] Attorney General's Department, *Trends in Federal Enterprise Bargaining Report*, Attorney General's Department: Canberra, various issues.

[7] "Current" EAs are those within their nominal term of operations, that have neither expired nor been terminated.

Trends in Private Sector Enterprise Bargaining

Using the latest available data, Figure 1 confirms the continuing decline in collective bargaining in Australia's private sector. Around 25,000 private sector EAs were in effect in 2010 (following the introduction of the FW Act).[8] Since 2013, the number of current EAs has fallen by over half – with only around 10,000 now in effect (at March 2019). An equally dramatic decline in the number of employees covered by those agreements has occurred, falling since 2013 to 1.3 million in March 2019.[9] There are almost 650,000 (or one-third) fewer private sector employees covered by a current EA than at end-2013.

Figure 1. Private Sector: Current EAs and employees covered 1991–2019



Data: Quarterly. Attorney-General's Department.
Historical data. March Quarter 2019, federally registered EAs only.

Since the size of the workforce expands over time, the decline in agreement coverage measured as a percentage of the total workforce has been even more dramatic. The share of employed private sector workers covered by a current enterprise agreement has declined to only 11% —just half the proportion as in 2013.[10] Conversely, in the public sector (where agreement transaction costs and the intensity of employer opposition to bargaining can be lower, and union density is higher), EA coverage has been largely stable: coverage by both state and federally registered EAs in the public

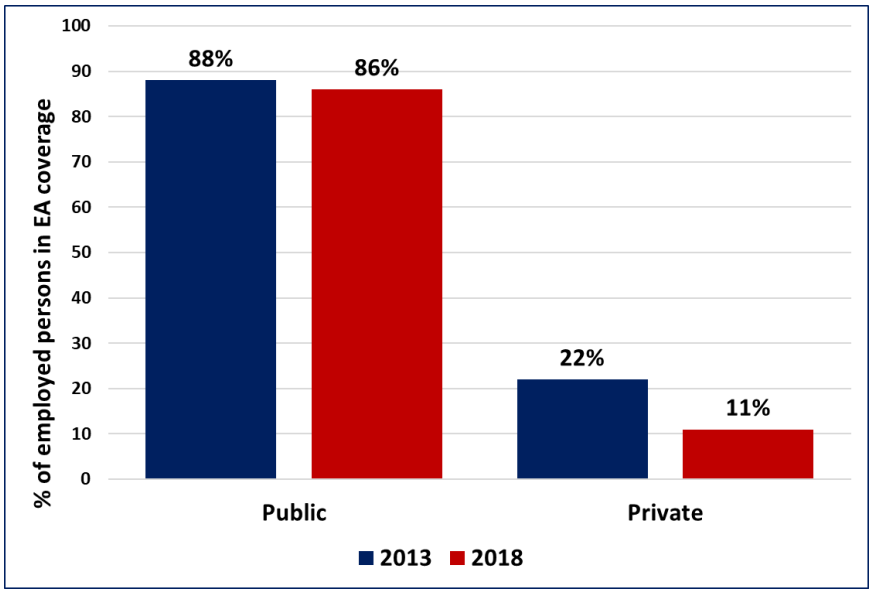
[8] Since agreements can continue to "roll over" after formal expiry, the WAD misses EAs which are expired but may still have some continuing, partial effect. For instance, while most EAs will not provide for incremental wage increases after they expire, other EA conditions (including working conditions, paid time off, representation, and other matters) may stay in effect after agreement expiry.

[9] Private sector EA coverage hit a low of under 1.2 million workers in 2018, but has since rebounded slightly to 1.3 million due largely to the renewal of a few large EAs in the retail industry.

[10] The ABS does not publish a consistent time series for total employment by broad sector (public/private). For 2013, ABS Catalogue 6310.0 was utilised. For 2018, annual average data was utilised from ABS Catalogue 6291.0.55.003, Table 26a.

sector declined by only 2 percentage points between 2013 and 2018, from a much higher starting point (from 88% to 86%).[11]

Figure 2. Estimated EA Coverage Rates for Private and Public Sector Workers, 2013–18



Data: Author's calculations from AGD *Trends in Enterprise Bargaining Report* and ABS. Public sector coverage estimates combine current federally registered EAs and state-registered EAs as reported in Attorney-General's *Trends, Technical Notes* (based in turn on unpublished ABS data). State public sector coverage includes employees under EAs that are not current. Total employment by sector derived from ABS Catalogues 6291.0.55.003, Table 26a., 6310.0. Annual averages.

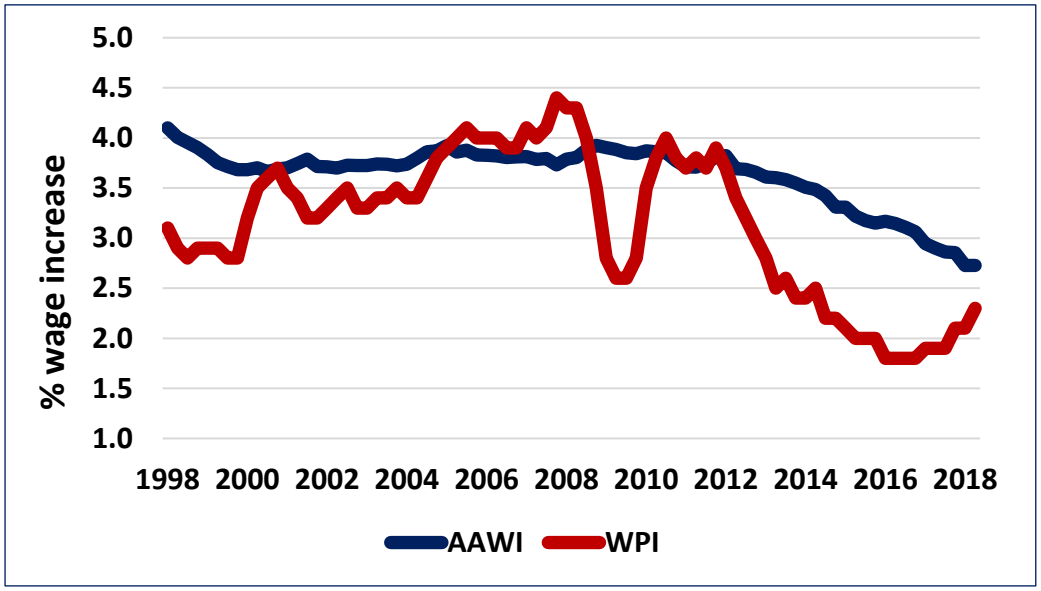
It is clear that rapid decline in EA coverage in the private sector has been a significant factor in the unprecedented deceleration of wages growth. This is because workers covered by an EA consistently receive stronger wage increases than those without an EA. But the impact of this EA wage growth advantage on overall wage trends is diminished when fewer workers are covered by EAs.

In the early-2000s, broader private sector wage growth (measured by the ABS's Wage Price Index, WPI) and EA wage growth both fluctuated in the 3–4% range. Wages were disrupted by a temporary slowdown during the Global Financial Crisis (GFC) in 2009–10 (though not for workers on EAs). A more dramatic and lasting deceleration in wages took hold beginning around 2013. Broader private sector wage growth fell by half in the coming years, bottoming out at under 2% in 2016 and 2017, and rebounding only modestly since then (see Figure 3).

[11] Public sector coverage ratios illustrated in Figure 2 combine current federally registered public sector agreements reported in the WAD, with estimates of state-registered EA coverage from unpublished data reported in AGD's *Trends* document, "Technical Notes". That data in turn is derived from estimates of state-registered agreements from the ABS' Employee Earnings and Hours survey (Catalogue 6306.0). The EEH measures coverage by broad pay-setting method and includes workers that are covered by expired EAs, hence overestimating the extent of coverage by current EAs. However, most EAs in state public service workplaces are renewed regularly, so the extent of this overestimation of state public sector coverage is modest.

Over the same period of time, wage increases specified in EAs (measured by the AGD's Average Annualised Wage Increase, AAWI) also declined gradually from around 4% in 2013 to less than 3% in 2018; but throughout this period they averaged more than 1 full percentage point higher than the overall private sector average. However, this "EA premium" narrowed in 2018 to less than 0.5-percentage-points. This narrowing can be explained by a partial rebound in WPI wage growth (resulting partly from a relatively strong increase in the minimum wage in 2018[12]) and further weakening of both enterprise bargaining coverage and the wages outcomes contained in these EAs.

Figure 3. Private Sector Wage Increases (WPI and AAWI)

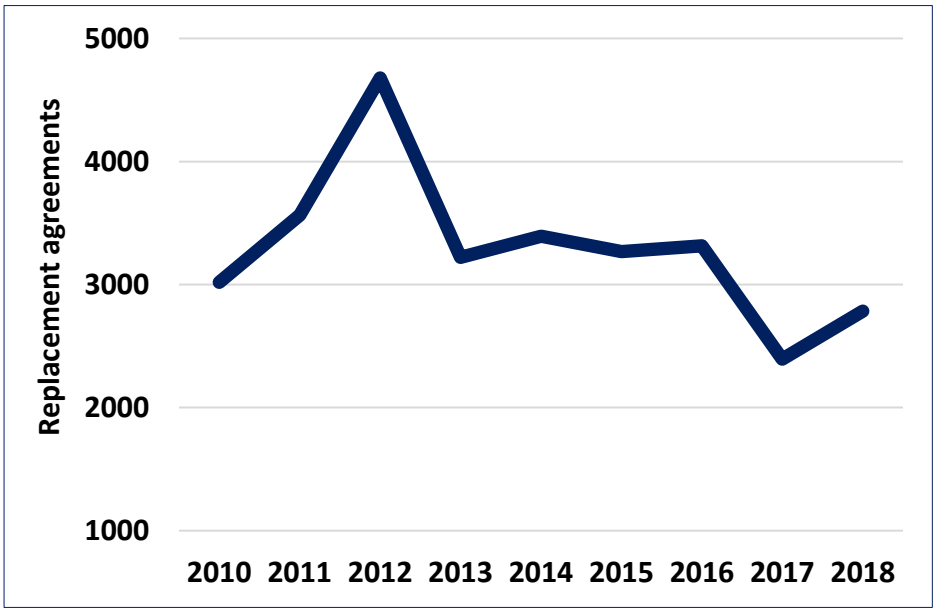


Data: Average Annualised Wage Increase (AAWI) figures for current agreements from WAD. Wage Price Index trend figures from Australian Bureau of Statistics, *Wage Price Index*, Catalogue 6345.0, ABS, November 2018, Table 1. Year-over-year changes.

The decline in the number of enterprise agreements in effect in the private sector reflects three negative dynamics acting simultaneously. First, many existing agreements are not being renewed when they expire. The number of replacement agreements was highest in 2012 – consistent with the renegotiation of agreements approved in the early years of the FW Act. But after this initial "batch" of renewals, fewer and fewer EAs are being replaced each year. By 2017, only about as half as many EAs were renewed as in 2012.

[12] Stanford finds the modest 0.2% rebound in the annual WPI from 2017-18 was due almost entirely to the impact of the FWC's decision to increase the minimum wage by 3.5% in July 2018. See J. Stanford, 'The Importance of Minimum Wages to Recent Australian Wage Trends', Centre for Future Work: Sydney, 2019.

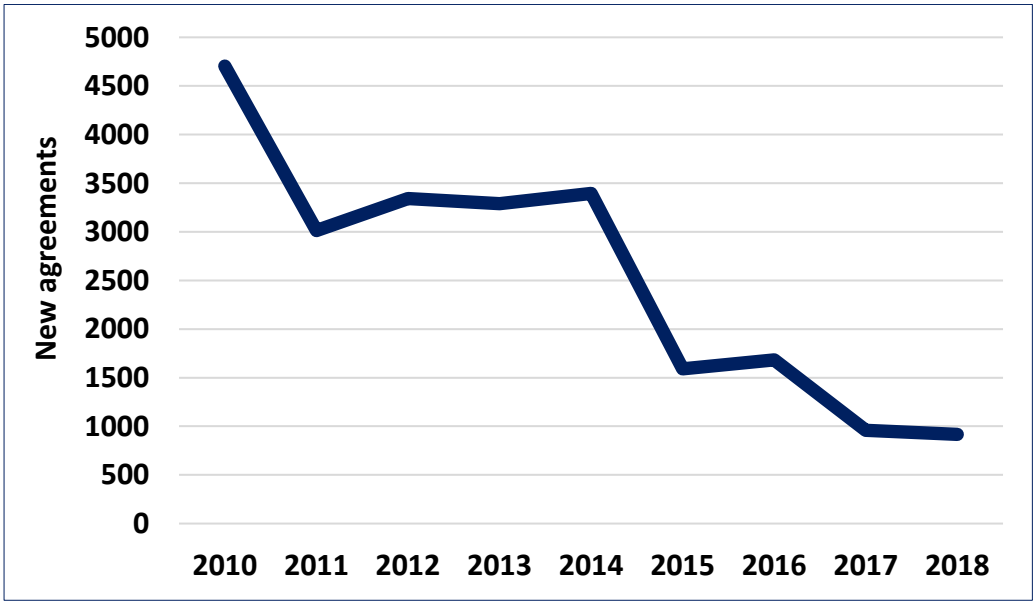
Figure 4. Fewer Agreement Renewals



Data: WAD. Agreements approved each year. Private sector only.

A second negative factor contributing to the decline in EA coverage has been a dramatic and sustained decline in the number of new agreements negotiated. Figure 5 shows while close to 5,000 new agreements were approved in 2010 (when the FW Act was new), the number of new EAs approved declined sharply 2011, and then again after 2014. Less than 1,000 new private sector agreements were approved in 2018. The dramatic decline in new agreement-making is one of the clearest indicators that enterprise bargaining is in crisis.

Figure 5. Collapse of New Agreement-Making



Data: WAD. Agreements approved each year. Private sector only.

The third negative dynamic driving the fall in EA coverage is the growing trend of employers terminating EAs. Terminations "lock in" the decline in current EAs resulting

from non-renewal.[13] And when terminations occur during renegotiation, they also dramatically alter the bargaining relationship between parties, because workers face the possible reversion of wages and conditions to minimum levels specified in the relevant Awards. Terminations data reported by the FWC indicate the number of agreements terminated tripled in two years between 2014 and 2016 to over 500 EAs terminated; terminations have remained at those elevated levels (500 or more per year) ever since.

The FWC has been more favourable to employer EA terminations requests following its precedent-setting 2015 decision to allow the Aurizon rail company to terminate its expired EA during renegotiations. Given that precedent, other employers have also requested approval to terminate EAs during renegotiation, many of which the FWC has approved. Those contested cases constitute only a small share of total terminations (around 3.5% of all terminations for the period June 2018 through October 2018). But they nevertheless exert a significant chilling effect on EA negotiations.[14] And by approving this aggressive tactic, the FWC has facilitated employer threats of large reductions in wages and conditions for affected workers (whose compensation could be cut back to minimum Award levels), thus significantly shifting the balance of power in employers' favour.

The termination or non-renewal of large EAs in the retail and fast food sectors played an important role in the collapse in EA coverage after 2013. This was especially clear after the FWC terminated the Coles Supermarkets EA for failing the BOOT in 2016. This important decision led to a slowdown in retail and fast food EA-making, as all parties grappled with the implications of the decision for future negotiations. Some large employers in these sectors (led by Coles and Woolworths) have subsequently negotiated new BOOT-compliant EAs, and this explains the flattening of the decline in total private-sector EA coverage over the past year (visible in Figure 1).[15] It is interesting to note that many of these new retail and hospitality EAs do not include quantifiable wage increases, instead tying future wage gains to changes in the national minimum wage and/or Award rates; for this reason, the renewal of these agreements will likely have a more muted impact on wage growth than would normally be the case.[16] We anticipate that other potential EA renewals in retail and fast food businesses

[13] An expired and non-renewed EA can retain some force (since its terms and conditions will generally remain in effect until it is renewed or terminated), but expired EAs cannot generally provide for wage increases.

[14] For example, workers engaged in bargaining at Griffin Coal in Western Australia had their EA terminated in 2016 which resulted in their pay being cut by 43% (reverting to wages specified in the 2010 Black Coal Mining Industry Award) for 12 months before another agreement was reached. See *The West Australian* (no author), 'Griffin Coal miners cop mammoth pay cut, await return-to-work date to end six-month strike,' 12 February 2018.

[15] The renewal of the large Coles and Woolworths EAs led a sharp increase in retail sector current EA coverage from 44,000 to 231,000 workers between March 2018 and March 2019. However, that rebound was partly offset by continuing decline in EA coverage in other private sector industries; total private sector EA coverage increased by about 140,000 in the same period.

[16] On the other hand, national minimum wage increases have been relatively strong in the last three years, and are currently comparable to increases specified in many EAs.

could return around 150,000 more employees to current EA coverage in the coming year. That would offset about one-quarter of the cumulative decline in private sector EA coverage that has been registered since end-2013.[17] Despite this potential rebound, renewal of some (not all) of the large retail and hospitality EAs will not halt the cross-industry decline in private sector EA coverage. Other industries which have also incurred substantial declines in current EA coverage since end-2013 include manufacturing (-160,000), construction (-80,000) and finance and insurance services (-65,000).

In conclusion, this section has documented the rapid decline in EA coverage in the private sector since end-2013: some 650,000 workers have lost EA coverage, and the number of current EAs has dropped by 60%. This decline will continue, undermining wage growth even further, and threatening the very viability of the collective bargaining regime, without urgent action to stop and reverse this problem.

[17] Recent large retail and fast food EAs that have been submitted to the FWC for approval, or have already been approved by the FWC since March quarter 2019 data was released, include McDonalds, Hungry Jacks, Big W, Bunnings, Officeworks, and BWS.

What is Business Proposing?

In the wake of the surprising electoral victory of their preferred party, business lobbyists and peak bodies have quickly assembled an ambitious and comprehensive IR "wish list" to present to the re-elected government. In the realm of collective bargaining, the major components of that agenda include:[18]

(i) Abolish the Better Off Overall Test

One key workplace relations change proposed by employer groups is removal of the Better Off Overall Test (BOOT) applied when the FWC approves enterprise agreements – to be replaced by a weaker "no-disadvantage" test.[19] The Productivity Commission (PC) also called for the BOOT to be abolished in its 2015 review of the workplace relations framework.[20] A weaker no-disadvantage test would relax the FWC's criteria for assessing whether an agreement provides for wages and benefits that are an improvement on those stipulated in minimum Awards. Under business proposals, the test would only apply to broad "classes" of employees, rather than guaranteeing at- or above-Award outcomes to each individual employee under the agreement.

Business lobbyists have claimed that increased FWC scrutiny applied in BOOT assessments since the Coles Supermarkets EA was terminated in 2016 has become a barrier to EA-making. BOOT assessments are regularly cited as the main culprit in the FWC's "overly technical approach" in agreement ratification, purportedly increasing transaction costs for employers in formulating EAs. This is because of the time and attention required for the approval process, and because more deals have needed undertakings in order to comply with BOOT requirements.[21] In addition to arguing for more administrative "efficiencies" for employers in EA-making, business lobbyists clearly aim to decrease labour costs for at least some groups of workers. Chief Executive of the Business Council of Australia (BCA) Jennifer Westacott labelled the BOOT a "productivity killer,"[22] due to the limits it imposes on employers trading off minimum

[18] Business lobbyists have proposed several other IR reforms not considered in this paper, including a weakening of protections against unfair dismissal and measures to redefine casual employment (to avoid implications for casual workers' entitlements arising from the Skene decision).

[19] A no-disadvantage test was implemented as part of the initial policy of enterprise bargaining in the early 1990s. It remained in place until 2005, when it was removed as part of the Coalition government's Work Choices legislation and replaced with a weaker process of assessment against five minimum conditions. In 2007, the Coalition government re-introduced a "Fairness Test" to supposedly ensure that any violations of minimum Award conditions were offset with "fair compensation." In 2008 the new Labor government reintroduced a no-disadvantage test, which was then strengthened further with the BOOT under the FW Act in 2009. Meanwhile, the Coalition's initial five minimum conditions were also superseded by the set of National Employment Standards under the FW Act. See A. Stewart et al., *Creighton and Stewart's Labour Law* (Sixth Edition), Sydney: Federation Press, 2016, esp. p. 393.

[20] Productivity Commission, *Workplace Relations Framework,* Inquiry Report, Canberra, 2015.

[21] See AiG, *Enterprise Bargaining: Concurrent Session Paper,* Policy Influence Forum, 2018.

[22] Speech by Chief Executive Jennifer Westacott at The Westin, Perth. 'Accelerating economic growth'. 13 August 2019. Transcript available at https://www.bca.com.au/accelerating_economic_growth.

Award conditions (such as penalty rates) for other provisions.[23] But the connection between these compensation issues and true productivity growth (which depends on output, efficiency and technology, not compensation) is unclear. It seems that the real goal of the business community's "flexibility" agenda is to lower labour costs — with or without EAs.

By enforcing the principle that no worker should go backwards under an enterprise agreement, the BOOT assessment is a "last line of defence" for employees who have not received genuine representation or have limited bargaining power during settlement of an EA's terms and conditions. Worryingly, the greater strictness and effectiveness of the BOOT in the wake of the Coles decision has already been whittled away by several subsequent FWC rulings.[24] Any further erosion of the BOOT principle, or its abolition altogether, would undermine the core purpose of collective bargaining as defined under the FW Act: namely, that enterprise agreements are intended to improve on the "floor" established by minimum conditions in the Awards.

By advocating for weakening or eliminating the BOOT, employers reveal their desire to use EAs to facilitate the derogation of minimum standards. This is especially concerning given the ease in which employers can already implement non-union EAs without any genuine negotiation with employees. Combined with business lobbyists' proposals to weaken agreement scrutiny (discussed below), proposals to scrap the BOOT signal a return to the Work Choices era: when employers could unilaterally develop agreements containing below-Award conditions, and present employees (in some cases very small, unrepresentative groups of workers) with the agreement for approval, without having conducted any genuine negotiations or any diligence that workers were reasonably compensated for violations of minimum standards. Claims by business lobbyists that allowing EAs to undermine Award minimums will increase the number of EAs may be true. But expansion of inferior, below-Award "deals" would make workers' employment conditions – including wage outcomes – worse, not better, thus defeating the whole point of collective bargaining.

[23] Until the 2016 Coles Supermarkets EA termination, employers in big retail and fast food firms had been reducing their labour costs through a practice of "rolling up" base hourly rates in lieu of full payment of penalty rates and other entitlements.

[24] Recent FWC rulings have diluted the more universal precedent set by the 2016 Coles BOOT decision. These include a recent rejection of the NUW's argument that an EA failed the BOOT because it did not provide rostered days off or Time Off in Lieu (benefits both provided under the relevant Award) on the basis that the benefits amounted to "non-objective lifestyle factors" that the BOOT could not reasonably protect. See Workplace Express, 'Personal preferences would "mire" BOOT, says FWC', 12 August 2019.
A non-union construction EA paying rates nearly 4% below the Award was approved by the FWC despite the presiding tribunal member knowing that the EA was not BOOT compliant. The agreement was eventually overturned after the CFMMEU applied for termination. See Workplace Express, 'Deal approved despite FWC's own BOOT concerns: Bench', 23 August 2019.
In another case, the BOOT was reinterpreted as a "global assessment" for a non-union EA that contained lesser wages and allowances than those in the Award for some employees. The agreement was approved. See Workplace Express, 'Employer's approach didn't discourage union involvement: FWC', 22 August 2019.

(ii) Weaken EA Approval Processes; Facilitate More Non-Union EAs

Weakening scrutiny and ratification processes applied to non-union agreements, and simultaneously weakening union representation and participation in EA-making, are complementary strategies that would also expand employers' power to unilaterally set wages. To this end, business lobbyists complain that existing requirements to provide sufficient evidence that employers have explained the terms of agreement to their employees and obtained genuine agreement from them are too strict, and create "delays" in EA-making. Current rules under the FW Act require the FWC to be satisfied that employers have obtained "genuine agreement" with their employees;[25] this is an especially vital protection for workers when no union has been involved in negotiating the agreement. Evidence that genuine agreement has been reached requires employers to demonstrate to the FWC that they have taken reasonable steps to notify employees one week in advance that a vote will be conducted on a new agreement, to provide access to the proposed agreement, and to explain all agreement terms to employees.[26] But even these modest requirements are deemed too onerous by the Australian Mining and Metals Association (AMMA), which argues that current standards for providing proof of genuine agreement are "overly stringent" and should be relaxed.[27] A second proposal by AMMA to reduce agreement scrutiny involves fast-tracking the FWC approval process when agreements cover the majority of employees, and deliver a wage increase at a prescribed percentage rate above the safety net. This proposal would decrease scrutiny of EAs (particularly of their non-wages conditions).

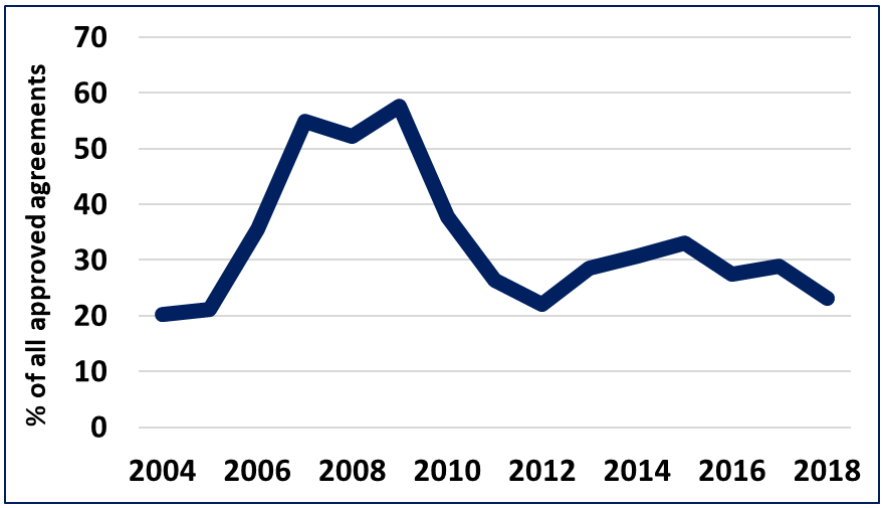
Unions have the right to challenge the approval of a non-union EA at the FWC where an existing EA confers specific rights to them (such as consultation and dispute resolution rights). The FWC also has broad discretionary powers to confer with unions during the approval of agreements given unions' knowledge of the industry in which the employer operates, and expertise in the underpinning Award.[28] Should AMMA's proposal to fast-track EAs be adopted, this could also block the possibility of the FWC invoking union involvement or representation at the approval stage.

Should the parallel proposals (described above) to weaken the BOOT be combined with a relaxation of requirements governing the approval process, the number of low-wage non-union EAs will likely expand. Indeed, the last time that EAs could be used so easily to reduce labour costs (evading minimum standards in the Awards) was under Work Choices, when the no-disadvantage test was removed entirely. Figure 6 shows this resulted in an explosion of non-union EAs being approved; they rose from 20% of all private sector EAs in 2004-05, to 55% in 2007, as employers took advantage of the opportunity to implement unilaterally-designed EAs and thus reduce labour costs. Non-

[25] *Fair Work Act 2009* s.188(1).
[26] *Fair Work Act 2009* s.180.
[27] See Australian Mines and Metals Association, *Pathway to Productivity: The Resources and Energy Industry's Workplace Priorities for the 46th Australian Parliament,* August 2019.
[28] *Fair Work Act 2009* s.590.

union EAs remained high, reaching almost 60% of all private sector EAs approved in 2009, until the FW Act was introduced and the BOOT was instated.

Figure 6. Non-Union EAs as Share of all Private Sector EAs



Data: WAD. Private sector agreements approved.

This temporary surge in substandard non-union agreements "polluted" the stock of EAs, with a lasting negative influence on wage growth that is visible even today. Multiple cases have emerged of Work Choices-era EAs operating in workplaces long after their expiry, paying below-Award rates for sustained periods of time – in some cases over 10 years later. For example, Merivale, a Sydney bar and restaurant group, was recently found to be paying around 3,000 staff up to 20% below Award wage rates under an expired 2007 non-union agreement.[29] Data on the number of now-expired EAs approved during the Work Choices era yet still in use are unavailable. But the legacy of the Work Choices era of expanded non-union below-Award agreement-making has certainly contributed to the continuing problem of wage stagnation: it supplanted more genuine collective bargaining processes, and even after they expired (without being renewed) these non-union "zombie" agreements fail to provide for further wage increases.[30]

(iii) Restrict Bargaining in Greenfields Agreements

Greenfields agreements are a class of agreement for employers establishing new enterprises or facilities. They are most common in capital-intensive industries like construction (which accounts for 51% of all current greenfields), transportation (12.7%), and mining (5.2%),[31] but can apply in any part of the economy. Greenfields are the only remaining bargaining instrument under the FW Act that requires unions in the relevant industry to participate in their negotiation. This requirement was reinstated by

[29] D. Marin-Guzman, 'Merivale reviewing 'viability' of operations due to axing of Work Choices EBA', *Australian Financial Review*, 21 January 2019.
[30] While most expired EAs will not contain wage increases after they expire, other EA provisions (including working conditions, paid time off, representation, and other matters) may stay in effect.
[31] Attorney-General's Department, *Attracting major infrastructure, resources and energy projects to increase employment - Project life greenfields agreements.* Discussion paper, Canberra, 2019, p. 3.

the FW Act in 2009. From 2006 through 2009, under the previous Work Choices regime, greenfields agreements could be implemented unilaterally by employers; business lobbyists have yearned for a return to that system since 2009. After pressure from employer groups, the FW Act was changed (in the *Fair Work Amendment Act* 2015) to impose maximum six-month renegotiation periods. This provision allows employers to seek FWC approval of greenfields agreements even if they do not secure agreement from unions within the prescribed bargaining period.

At present the FW Act requires all agreements (including greenfields) to include a nominal expiry date that is no longer than 4 years after the FWC has approved the agreement. Business is now proposing legislative changes that would enable greenfields agreements to have expiry dates that match the life of the entire new facility or enterprise. Under this proposal, these agreements would become "whole-of-life" agreements, no longer subject to normal renegotiation rules that apply to other expired agreements. Even though its "review" of IR policy is just beginning, the Coalition government has already announced it plans to proceed with legislating this change. And the AiG has called for the extension of "whole of life" provisions to all agreements (not just greenfields).[32]

Peak mining and resources lobby group AMMA and the government's Productivity Commission have both claimed that unions' capacity to obtain higher wage increases through industrial action undermines investment certainty for large mining and resources companies in Australia. To be sure, there are many factors casting doubt on the viability of major mining and resources investments in Australia today – predominantly arising from environmental, geopolitical and economic factors. But the claim that unpredictability of labour costs in highly profitable and capital-intensive mining and resources projects is undermining overall investment levels is far-fetched.

There are several problems raised by "whole-of-life" agreement proposals – notwithstanding Australia's obligations under international labour law conventions to guarantee the rights of workers to collectively bargain their pay and conditions. It is unclear how "projects" will be defined, and hence whether whole-of-life agreements may even extend beyond the construction phase for a new facility into standard operations. By including the operations phase of operations, "project life" could stretch into decades-long periods (such as covering the entire productive life of a mine operation). It is unclear in what circumstances agreements with hyper-extended terms could be brought to an end. Moreover, under current greenfields-making rules, two or more employers can negotiate a multi-enterprise greenfields agreement; extended to a whole-of-life context, this would create the potential for employers to band across locations or even industries to fix wages for extended periods and diminish democratic bargaining rights for large numbers of workers.

Proposals to restrict bargaining in greenfields and other project-related agreements represent another front in business's strategy to both erode requirements for

[32] See Workplace Express, 'Employers seek broader application of life-of-project deals', 22 October 2019.

representation, and constrain the process of negotiations. But since greenfields agreements receive unique treatment under the FW Act as a separate class of agreement, these proposals also mark a more insidious move to repurpose greenfields as instruments to increase employer wage-fixing power. Project-life agreement proposals expose a glaring contradiction within business lobbyists' industrial relations agenda. Fixing agreements for many years is clearly at odds with a supposed concern for "greater flexibility"; but where greenfields are concerned, business lobbyists are explicitly promoting the *elimination* of flexibility.

(iv) Expand Prohibited Content Rules

The AMMA has called for the restoration of Work Choices-era restrictions on matters that can be included in agreement negotiations and agreements themselves.[33] Specific proposals for further limiting bargaining scope include preventing EAs from limiting labour hire and contracting (prohibiting clauses that extend the same wages and conditions of employees to external workers),[34] and clauses that require unions to be consulted before major changes to working arrangements are implemented (such as variations in working hours and rosters). Clauses that protect the employment security of the existing workforce by extending "site rates" to contractors and labour-hire workers, as well as union consultation rights, were both "prohibited content" under the Work Choices regime; severe penalties were introduced for employers who negotiated agreements that included such clauses.[35]

Contrary to assertions from employer groups that the scope of matters available for employees under current enterprise bargaining rules constitutes a "free-for-all", bargaining scope is already very limited under the FW Act. While prohibitions on bargaining employment security provisions and basic union consultation rights were lifted with the introduction of the FW Act, the laws determining bargaining scope remained tied to an inflexible early-20th century legal mechanism based on court interpretations of "matters pertaining" to the employer-employee relationship – largely interpreted under the FW Act as straightforward employment conditions (e.g. wages, entitlements, hours of work).[36]

The proposal from business groups to expand prohibited content laws contradicts their own claims that their aim is to facilitate better bargaining and raise wages. Prohibitions on union representation rights in agreements undermine collective bargaining; and allowing lower-wage labour hire and subcontractor workers to operate alongside agreement-paid employees also undermines the wages and security of the existing

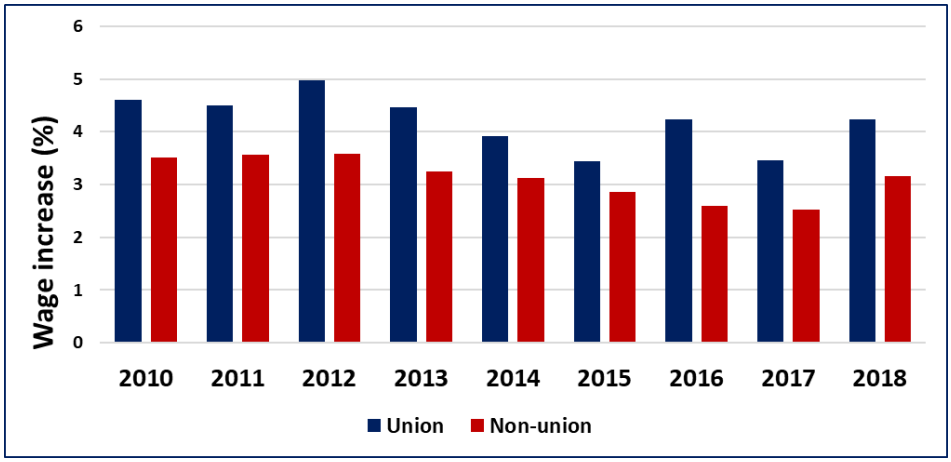
[33] See Australian Mines and Metals Association, *Pathway to Productivity: The Resources and Energy Industry's Workplace Priorities for the 46th Australian Parliament,* August 2019.
[34] At present "site rates" are considered permissible in agreement content. For a detailed overview of permitted matters under the FW Act, see Stewart et al., *Creighton and Stewart's Labour Law* (Sixth Edition), Sydney: Federation Press, 2016, p. 365-373.
[35] C. Sutherland, *Agreement-making under Work Choices: The impact of the legal framework on bargaining practices and outcomes*. Monash University, 2007.
[36] See *Fair Work Act 2009* s.172(1).

workforce. Moreover, further narrowing bargaining scope through an even tighter focus on "direct employment matters" will mean employees cannot reasonably negotiate the introduction of new workplace practices in their EAs, including those with genuine productivity benefits (e.g. training, skills, and technology provisions).

Business's Dream: A "Bargaining" System Without Bargaining?

In a recent report on enterprise bargaining, the BCA celebrated the benefits of enterprise agreement coverage, by comparing higher average wage outcomes obtained under EAs with other pay-setting methods.[37] Ironically, this endorsement of enterprise agreements was offered as part of their vision for an enterprise bargaining system that paradoxically would involve less union representation and reduced scrutiny by the regulator. But empirical data proves that union representation is essential to achieving higher wage gains enjoyed by workers covered by EAs – the very advantage that the BCA extolled in its own report.

Figure 8. Wage Increases in Union and Non-Union Private Sector EAs



Data: WAD. AAWI for agreements approved.

There are two key pieces of evidence which confirm the positive impact of unions on wage outcomes in EAs. First, wage increases obtained in union agreements have been significantly higher than in non-union agreements.[38] On average, wage increases in union-covered EAs approved each year have been 1-percentage-point higher than for non-union agreements since 2010 (see Figure 8).[39] Indeed, that is the same percentage difference in wages growth observed between *all EAs* and the private sector average (as

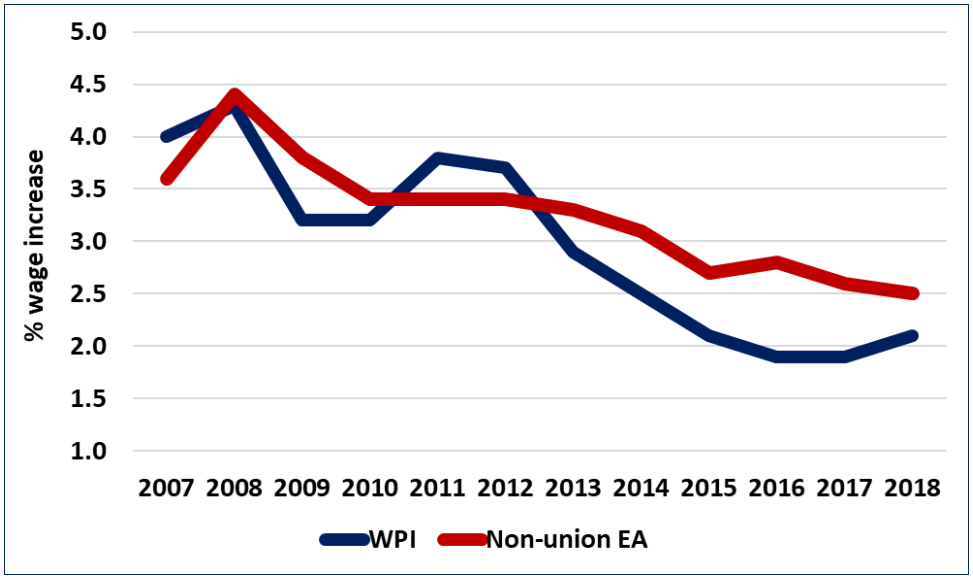
[37] See Business Council of Australia, *The State of Enterprise Bargaining in Australia*, August 2019.

[38] Keep in mind, as noted above, that the FWC's classification of agreements into "union" and "non-union" categories only reflects whether at least one union has opted to be "covered" by an EA, not necessarily whether it was involved in actually negotiating it. In the absence of more accurate data, we can only use union coverage as a proxy for union participation in negotiations.

[39] Over half of all non-union EAs approved from 2010–18 did not even have quantifiable wage increases, linking wage increases to non-legislated measures like CPI, minimum wage decisions, or (most often) left to employer discretion.

measured by the WPI). Since the majority (65%) of the current EA stock consists of union agreements, any further weakening of union representation would increase the proportion of non-union agreements within the total EA stock; this would further mute the beneficial impact of EA coverage on overall wage trends.[40]

Figure 9. Wage Increases in Non-union EAs (AAWI) Vs. Average Wages Growth (WPI), Private Sector



Data: ABS Catalogue 6345.0 and AGD's *Trends in Enterprise Bargaining* (2010-18). WPI for private sector only. Annual averages. AAWI for all current non-union EAs at December quarter.[41].

A second indication of the positive impact of unions on wage increases in EAs can be attained by comparing average wage increases in non-union EAs with workers in the broader private sector on average (measured by the WPI). Figure 9 shows that wages growth in non-union deals and the wider private sector tracked closely between 2007 and 2010. Non-union current EAs then delivered *lower* wages growth than the private sector average during 2011–12 (around 0.3 percentage points lower). A small non-union EA wage advantage has appeared since 2013 of around 0.5 percentage points. However, this was not due to the improved performance of non-union EAs (whose specified wage increases have dropped almost 1 percentage point, to 2.5% in 2018), but due to the extraordinary weakness of the WPI. Figure 9 confirms there is only a marginal wage growth advantage for workers under a non-union EA; by contrast, the EA wage premium for *all* current EAs (led by the union-covered agreements that make up the bulk of current coverage) has averaged one full percentage point since 2013. Both of

[40] Since the duration of non-union EAs averages one year longer than union EAs, non-union agreements also effectively "lock in" lower wages for longer. For a more detailed comparison of average agreement duration of non-union and union agreements since 2010, see A. Pennington, *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector*, Centre for Future Work: Sydney, 2018.

[41] Figure 9 compares the WPI in the private sector with the AAWI for all current non-union EAs (both public and private sectors). However since there are almost no non-union agreements in the public sector (only 1% of all approved EAS in 2018), AAWI data for all current agreements is deemed an acceptable proxy for current private sector EAs.

these comparisons, therefore, confirm that union representation is the main cause of the EA wage growth advantage for private sector workers.[42]

The irony of business lobbyists advocating for the continuation of enterprise-level bargaining while at the same time leading an agenda to decrease union representation in bargaining cannot be ignored. What emerges from these post-election proposals is the clear view among business circles that collective bargaining would be better if there was simply no-one bargaining on the employees' side of the table. In other words, from the perspective of powerful business lobbyists, bargaining will always be more "efficient" when it doesn't happen at all.

Since the election, business lobbyists have come out in force proposing numerous measures to weaken employment rights and alter the rules determining the operations of unions, employers and the regulator (the FWC) in enterprise bargaining. Overall, the measures proposed signal a return to a Work Choices-like regime of unilateral employer wage-setting through agreements. Together, the measures proposed are likely to expand the number of non-union EAs, weaken above-Award standards in agreements, permit evasion of Award minimums, and diminish union representation in bargaining. More "flexibility" for employers to create non-union EAs that undercut Award minimums may preserve (or even expand) private sector EA coverage. But from the perspective of workers this would be futile. The limited amount of genuine bargaining activity that remains in Australia's collective bargaining system would only be stifled, further undermining already-weak wages growth.

An estimate of the potential order of magnitude of this downshift in wage growth resulting from the package of business proposals can be constructed as follows. As noted above, AAWI's in union-covered EAs have consistently exceeded those in non-union EAs by an average of about one percentage point per year. The removal of a meaningful no-disadvantage test under Work Choices (and its replacement by five minimum standards and a weak "fairness" test) led to a surge in unilateral employer-dominated non-union EAs, which accounted for close to 60% of all EAs approved during that period. If a similar surge in non-union EA-making occurs in the future (which is likely if the business agenda is fully implemented, including removal of the BOOT, its possible replacement by some weakened no-disadvantage or fairness test, and the watering-down of EA approval processes), the inevitable effect will be a reduction in average wage growth for EA-covered workers.

Table 1 summarises the potential impact on wage growth. If union-covered EAs (with their 1 point wage growth premium) shrink from 80% of all approved EAs at present to 40% (as occurred under Work Choices), then the composite weighted average AAWI for all approved EAs would fall by 0.4 percentage points.[43] Assuming current EA wage

[42] This outcome is nuanced further given the very relaxed definition of what constitutes a "union agreement" under the FW Act. This suggests even a minimal role for unions in agreement making still delivers stronger wages outcomes than EAs without any employee representation.

[43] The weighted average AAWI premium shrinks from 1%*0.8 to 1%*0.4. This assumes no impact on the ability of unions to continue achieving that 1% wage growth premium, and hence this simulation should be seen as

trends are broadly maintained (with AAWIs for newly approved union EAs running at around 4%, and one percentage point lower for non-union EAs, as illustrated in Figure 8), that downshift in average wage growth for EA-covered private sector workers would translate into a growing loss in weekly income over time – once lower wage growth becomes fully reflected in the stock of current EAs.[44] Compared to average weekly earnings for full-time private sector workers (equal to approximately $1600[45]), this would produce a loss in average income of over $20 per week (or over $1000 per year) for a representative EA-covered private sector worker by the third year (corresponding to the length of a single typical EA). The cumulative loss in income through that initial three-year period exceeds $2000. Individual and aggregate income losses would compound over time, as the slower rate of wage growth continues to undercut earnings.

Table 1
Wage Losses from Shift to Non-Union EAs

	Year 1	Year 2	Year 3	Cumulative
Starting weekly wage of $1600; 4% AAWI for union-covered EAs; 3% for non-union EAs.				
80% Union-covered EA share	$1,661	$1,724	$1,789	
40% Union-covered EA share	$1,654	$1,711	$1,769	
Difference per Week	$6	$13	$21	
Difference per Year	$333	$690	$1,072	$2094

Source: Author's calculations from ABS Catalogue 6302.0, Table 5, and Attorney-General's Dept., WAD and *Trends in Federal Enterprise Bargaining*, as described in text.

It is possible that the impact of final changes to the BOOT and EA approval processes may not stimulate the same dominance of employer-led EA-making as was permitted under Work Choices. But these simulations confirm that the direction of change (form genuine collective bargaining to employer-dominated non-union EAs) will clearly undermine wage growth, and the cumulative loss to Australian workers would be large by any definition. At a time when wages are already experiencing unprecedented

conservative. In reality, employers' greater ease in accessing unilateral non-union EAs would undermine the bargaining position of many unions.

[44] There will be a time lag before these lower wage increases are embodied in the overall population of EAs, due to lags in renewal and renegotiation.

[45] See Australian Bureau of Statistics, *Average Weekly Earnings*, Catalogue 6302.0, Table 5.

weakness, the measures proposed by business would clearly undermine wage pressures even further, and reduce aggregate labour incomes by billions of dollars.

Recommendations for a More Viable Collective Bargaining System

The fundamental goal of collective bargaining is to provide workers with a democratic and effective mechanism to counterbalance the concentrated economic power possessed by employers. Individual workers have little bargaining power to win better wages and conditions – especially as work has become more insecure and fragmented in recent years (marked by more casual and temporary jobs, more independent contracting, and digitally-mediated gigs). Collective voice, genuine representation, and ability to exercise bargaining power (including through collective action) are essential to give workers a better chance of capturing a fair share of the gains of productivity and economic growth. The business proposals described above will not further these goals of genuine collective bargaining; to the contrary, they would set them back. Employers would be given more leeway to implement EAs without any democratic representation on the workers' side of the table, that would undercut the minimum standards of Modern Awards (rather than building on them), and that would apply for many years at a time without opportunity for renegotiation. Employers claim that these measures would allow for a more "efficient" and "flexible" bargaining system. In reality, they would facilitate the continued erosion of genuine collective bargaining, lock in wages and conditions for many years or even decades, and further undermine wage pressure in an economy already marked by the weakest wage growth of the entire post-war era.

If the goal is to genuinely strengthen collective bargaining, support collective voice and genuine representation, and lift wages and conditions, a very different direction is required in reforming Australia's IR laws. To this end, this paper concludes by offering ten specific counter-proposals to those being advanced by the business community:

(i) Retain the Better Off Overall Test

Under Work Choices, enterprise agreements could become unilateral employer instruments for paying employees below the rates and conditions stipulated in Award minimums. The practice of below-Award EA-making was rejected by Australian voters in the 2007 election. The subsequent Fair Work Act of 2009 reinforced the original intention of enterprise bargaining: namely, to deliver enterprise agreements that would be an *improvement* over minimum Award standards, reinforced by the Better Off Overall Test (BOOT). The BOOT ensures wages and conditions in EAs do not undermine those outlined in minimum Awards for *all* employees. The importance of protecting the integrity of the Award safety net remains strong, and the existing BOOT should remain in place.

(ii) Normal Renegotiation of Greenfields

Capital-intensive sectors like construction, mining and resources should not be exempt from the standard rules mandating regular renegotiation of EAs – rules that apply to all other industries in the economy. Regular collective bargaining throughout the lifetime of resource projects is a legitimate avenue for employees to secure a fair portion of the

wealth they help to create. Greenfields are currently the only agreement form that ensures rights of employees to union representation in bargaining; this practice should not be weakened by "whole of life" greenfields proposals.

(iii) Genuine Review and Approval of Agreements

Business attempts to relax requirements on employers to demonstrate that they have obtained genuine employee agreement on an EA before it is approved, and automatic approvals of EAs that provide above-Award wages at designated thresholds (thus avoiding assessment of non-wage conditions), would clearly undermine EA outcomes and expand the number of non-union EAs. The FWC's "genuine agreement" test is a vital protection for workers who have had no meaningful independent representation in negotiating the agreement. Instead of weakening existing moderate requirements on employers to obtain consent from employees for their proposed EAs, "genuine agreement" practices should be strengthened to require employers to engage in genuine negotiation with their workforce. Moreover, workforce representativeness tests should also be introduced to prevent the growing prevalence of "seed agreements." Through this strategy, employers obtain agreement for deals with inferior conditions compared to union agreements within the same firm or sector, by conducting targeted votes among smaller, non-representative groups of workers (often in artificially-constructed subsidiary firms). Once agreement is obtained, employers can then expand the workforce hired under that weaker agreement. This process should be curtailed by requiring the population of workers voting on an EA to be genuinely representative of the full workforce of the company's relevant operations.

(iv) Conversion and Phase-Out of Non-Union EAs

The ease with which collective agreements can be made without any meaningful union participation or independent representative structures delegitimises collective bargaining and genuine workplace democracy. With low union workplace presence and EA coverage, many Australian workers have no consistent representative structure through which they can advance their claims and take action in support of them. In the absence of a bargaining infrastructure, non-union EAs are especially subject to unilateral influence and manipulation by employers who can dictate the terms of a proposed agreement without any negotiation whatsoever. The legitimacy of collective bargaining would be improved by the phasing out or conversion of non-union EAs into authentic agreements, founded on democratic representation for affected workers and actual negotiations on their behalf. This could be achieved by introducing a simple notification system alerting the FWC and relevant unions of agreement expiry; provision of institutional supports to allow unions to initiate consultations with affected employees and negotiations with employers; and FWC resourcing to provide bargaining facilitation services to achieve more genuine agreements.

(v) Sectoral Bargaining

With only 11% of private sector employees covered by a current EA, Australia's highly decentralised enterprise-level bargaining system is failing to extend bargaining rights to the majority of workers. The OECD now warns against highly decentralised bargaining systems due to their association with higher unemployment, underemployment and income inequality compared to more centralised bargaining systems.[46] Sectoral or industry bargaining is a necessity for resolving worker bargaining imbalances created by increased contracting out (including of government-funded social services), corporate franchising, and employer use of subsidiary holding companies – all of which work to fragment a workforce within larger firms or operations. An economy comprised of smaller firms, fragmented workplaces, and insecure work arrangements demands bargaining scope be expanded to re-aggregate workers across sectors or industries, and allow them to fairly bargain for pay increases and other improvements. Unions have insufficient resources to "keep up" with this fragmentation, nor to resource enterprise-level bargaining across the whole economy. Sectoral bargaining offers an institutional mechanism to restore collective bargaining and support fairer distributional outcomes to promote wages growth, and equality in pay outcomes. By fixing wages across similar businesses, sectoral bargaining can also drive new employer incentives toward real productivity-enhancing investments (such as new technologies and workforce skills), rather than just reducing labour costs.

(vi) Expand Permissible EA Content to Lift Productivity

Employees should be allowed to bargain over genuine productivity-enhancing improvements in their workplaces, including topics such as workplace organisation, technology implementation, skills and training, and investment. The FW Act presently limits the span of permissible content that can be negotiated in EAs based on a narrow and inflexible interpretation of the employer–employee relationship (largely limiting negotiation to wages and conditions). This denies employees agreement-level mechanisms for extending their knowledge and expertise into improving business operations. Current permissible EA content rules are prohibitively narrow, and inconsistent with building higher-trust employment relations within a modern, increasingly skilled workforce.

(vii) Enable Fairer and Sustainable Union Membership Systems

An important factor undermining EA negotiations and their outcomes is the full legal protection provided for "free riding" in Australia – through the FW Act's blanket prohibition of union preference arrangements, bargaining fees, and other traditional union security arrangements. Collective bargaining cannot be sustainably financed through voluntary individual contributions from a diminishing number of union members. By allowing any employee to access benefits attained through collective

[46] Organization for Economic Cooperation and Development, 'The role of collective bargaining systems for good labour market performance,' *OECD Employment Outlook*, 2018, pp. 73-122.

bargaining by unions – with no requirement to contribute to the costs of representation, bargaining, and enforcement of EAs – the current system clearly discourages union membership and weakens collective representation.[47] Provisions should be introduced to support the ability of workers by democratic majority choice to collectively fund representation and bargaining structures through union membership or bargaining fee provisions in workplaces. Ending full legal protection for "free riding" would be a first step to building a more sustainable financial base for the collective bargaining system.

(viii) Strengthen Employer Obligations to Bargain

Statutory obligations on employers to engage in genuine bargaining are necessary for the function of any operational bargaining system, but Australia's enterprise bargaining system is almost entirely dependent on the voluntary engagement of employers. The FW Act has only weak provisions to facilitate parties coming to the table for bargaining, with the final decision to negotiate or not resting exclusively with the employer.[48] A collective bargaining system that must lure employers into the system with economic incentives, rather than requiring their participation as a matter of normal practice, is unlikely to be one where workers are adequately represented and can achieve respectable outcomes. It is because of the structural weakness in mutual collective bargaining obligations that employers can simply "opt out" of agreement-making altogether, if they decide it is not in their immediate interests to bargain collectively.[49] Statutory obligations on employers to bargain must be strengthened as an expression of the key object of the FW Act: namely, to encourage and facilitate collective *bargaining*.

(ix) Strengthen EA Approvals, Enforcement and Arbitration Systems

Timelines for EA approvals at the FWC increased in the wake of the 2016 decision to terminate the Coles EA for failing the BOOT. The median number of days for agreement approvals increased from 41 days in 2015/16 to 71 days in 2016/17.[50] The Commission responded by creating a special "triage" agreement assessment unit, and taking other measures to accelerate approval processes. The FWC recently reported that it has now substantially reduced the median number of days for agreement approvals: cutting it in half, down to 35 days (lower than 2015/16).[51] It is ironic that despite this increased workload, the government has reduced funding to the FWC in the current financial year by $13 million (compared with the 2015-16 Budget allocation, the last one prior to the

[47] Published research has confirmed that the ability to access the benefits of a union-negotiated EA without having to contribute anything to the cost of its negotiation and administration is a predominant factor behind the large number of Australian workers who choose not to join their relevant union; see, for example, P Haynes et al, 'Free-Riding in Australia,' *Economic and Industrial Democracy* 29(1), 2008, pp. 7-34

[48] B. Creighton, 'Getting to the Bargaining Table: Coercive, Facilitated and Precommitment Bargaining', in S. McCrystal, B. Creighton and A. Forsyth (eds.), *Collective Bargaining Under the Fair Work Act*, Sydney: Federation Press, 2018, pp. 25–45.

[49] This is the implicit threat that business lobbyists make when they argue that if the BOOT is enforced, more employers will simply abandon collective bargaining.

[50] Fair Work Commission, *Annual Report 2016/17.* Available at https://www.fwc.gov.au/annual-report-2016-17.

[51] See Workplace Express, 'Criticism of agreement approval "queue" outdated: Ross', 23 August 2019.

Coles decision). Even so, funding should be restored to the Commission to support swift BOOT assessments, and equip the Commission to better regulate the quality of non-union agreements.

The decline of collective bargaining has caused a concomitant collapse in workplace-level employee negotiation structures. This means everyday workplace grievances and employment problems cannot be resolved swiftly and effectively — in the interest of both individual employees and employers. Instead, individuals and unions seeking redress for collective agreement breaches must invest significant resources to pursue litigation, which can be costly, lengthy, and unpredictable. Overall compliance would be strengthened in the enterprise bargaining system with a more effective and timelier umpire function, facilitating immediate resolutions on issues such as underpayment and workplace grievances. Widespread revelations of wage theft within Australian businesses demands employment law and minimum standards compliance systems be strengthened. An accessible dispute-resolution claims function within the FWC could clarify employer responsibilities through precedent, establishing better and more permanent employer behavioural standards.

Similarly, the value of collective bargaining would be enhanced by extending the authority of the FWC to arbitrate outcomes in protracted industrial disputes, in cases of multi-employer negotiations (where agreement is not attained after an appropriate period of bargaining), and in other challenging bargaining situations. Moreover, the integrity of collective bargaining also requires a more effective, timely, and well-resourced industrial umpire function, to enhance confidence that the agreed terms of EAs will indeed be implemented and respected in practice.

(x) Relax Restrictions on Union Activity

Finally, tighter restrictions on union activity have undermined collective bargaining by inhibiting unions' ability to recruit, organise and represent new members. These restrictions (including 24-hour notice periods, and a limited list of permissible reasons for entry) have also undermined the (previously) traditional role of unions in ensuring pay and working conditions are compliant with the current agreement and minimum labour laws. Unions should have their compliance inspection role restored.

Australia's restrictions on industrial action are among the harshest in the OECD. Strike action is limited to an enterprise negotiation period, and unions are required to traverse a lengthy, complex and fraught administrative process, with minor departures from these harsh rules potentially resulting in severe financial penalties and prohibitions. Restrictions on the right of unions to take industrial action must be relaxed to enable workers to take collective action to secure safety adequate standards, and to support their economic and social interests.

Conclusion

There has been a marked shift in power and distributional outcomes in Australia's labour market. After being outrun by productivity increases for more than 40 years, real wages growth has near-stopped, with the resulting surplus captured by rising corporate profits. Consequently, the proportion of national income paid to Australian workers has declined to a multi-decade low; and insecure and precarious work has proliferated as a proportion of total employment. A key reason for this shift in distribution and the de-linking of growth, productivity and wages has been the dramatic retrenchment of collective bargaining.

Since the early 1990s, the balance of power in employment relations has tipped steadily in favour of employers. The slow suffocation of employee bargaining power has left employees unable to improve their bargaining position over time; above-Award conditions in agreements have been stripped back. Employees have insufficient conditions remaining to sacrifice at the bargaining table for wage increases. And now employers have come after real wages growth.

It is clear that business lobby groups still view the path out of Australia's current economic doldrums as being paved with reduced wages bills, rather than the real productivity-enhancing investments the economy so badly needs. The structural problems in Australian business performance (marked by weak capital spending, sluggish productivity, poor innovation, and a stunted, resource-dependent role in global trade) are actually reinforced by an enterprise-level bargaining system that allows businesses to rely on continued suppression of labour costs to effectively subsidise their own failures.

The post-election IR agenda forming between the Coalition government and powerful business lobby groups could stifle already dwindling levels of collective bargaining and representation in Australia, further increasing employer power in an already highly unequal labour market.

Collective bargaining is an essential part of the wage-setting infrastructure necessary for achieving fair and efficient income distribution in a modern democratic country. But if more genuine reforms to restore the legitimacy of employee representation and facilitate genuine bargaining are not implemented, this latest incarnation of a business-friendly IR agenda will just be another nail in the coffin for collective bargaining in Australia.